NO. 73020-2

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON EMPLOYERS CONCERNED ABOUT REGULATING ERGONOMICS, ET AL., Appellants, v. WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES, Respondent, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND WASHINGTON STATE LABOR COUNCIL, AFL-CIO, Intervenors.	CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 16th day of February, 2003, I sent a true and correct copy of Brief of Respondent Department of Labor and Industries and Certificate of Service to be served upon the parties herein as indicated below:

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the foregoing being the last known business address.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of February, 2003, in Olympia, Washington.

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I. INTRODUCTION

This case is an Administrative Procedure Act (APA) record review brought by a group of state and national business organizations calling themselves WECARE, challenging the Department of Labor and Industries' (L&I or Department) rule aimed at reducing work-related musculoskeletal disorders (WMSDs). This rule was enacted on May 26, 2000, pursuant to the Washington Industrial Safety and Health Act, RCW 49.17 (WISHA).[1]

WMSDs[2] represent the largest unregulated occupational health problem facing Washington workers. Between 1990-1998, there were at least 52,000 WMSDs yearly among Washington workers. (CES 32; AR 117662).[3] During that period, the state workers' compensation fund paid over $2.6 billion for medical care and partial wage replacement for

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[1] A copy of the rule is attached as Appendix 1.

[2] The rule defines "work-related musculoskeletal disorders" as "work-related disorders that involve soft tissues such as muscles, tendons, ligaments, joints, blood vessels and nerves. Examples include: Muscle strains and tears, ligament sprains, joint and tendon inflammation, pinched nerves, degeneration of spinal discs, carpal tunnel syndrome, tendinitis, rotator cuff syndrome. For purposes of this rule WMSDs do not include injuries from slips, trips, falls, motor vehicle accidents or being struck by or caught in objects." WAC 296-62-05150.

[3] Throughout this brief, citations to L&I's rule-making file will be listed as "AR," followed by the page number. Citations to the Concise Explanatory Statement are listed as "CES," followed by the page number. References to the "Brief of Appellant" will be listed as "BA."

WMSD claims (CES 37; AR 117667). Self-insured employers paid at least $1.1 billion more (CES 37; AR 117667). To reduce the incidence of WMSDs, L&I adopted an ergonomics rule. WAC 296-62-051. It requires employers to reduce hazardous workplace exposures that cause or aggravate WMSDs below dangerous levels or to the degree feasible. Before these rules were adopted, there were no rules limiting such basic activities as the amount an employee could be required to lift. L&I estimates its rule will reduce the incidence of WMSDs by 40% and their costs by 50%. (CES 107; AR 117737; Cost Benefit Analysis (CBA) 50; AR 118077).

Before adopting the rule, L&I carefully analyzed the data before it, developed a regulatory approach consistent with the best available evidence, and explained its reasons for rejecting contrary data. The basis for L&I's decision is detailed in the Concise Explanatory Statement (CES) (attached as Appendix 2) the Cost Benefit Analysis (CBA) (attached as Appendix 3), as well as in the lengthy rule-making file compiled during the rule-making. The ergonomics rule is a careful and measured response to a pervasive, disabling problem that affects tens of thousands of Washington workers each year. Because L&I's analysis shows it relied upon a "process of reason," the rule should be upheld. *Aviation West Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 431, 980 P.2d 701

(1999), (*Aviation West*); and *Rios v. Dep't of Labor and Indus.*, 145 Wn.2d 483, 39 P.3d 961 (2002) (*Rios*).

II. COUNTER-STATEMENT OF THE ISSUES

1. What is the standard of review for rules meeting the definition of a "significant legislative rule" under RCW 34.05.328?

2. Does the rule comply with the rule-making requirements of the WISHA?

3. In enacting the rule, did the Department meet all procedural requirements of the APA?[4]

III. THE SCOPE AND REQUIREMENTS OF THE RULE

The rule applies to employers with "caution zone jobs" in their workplaces. WAC 296-62-05103. (CES 57, AR 117687) includes a diagram of the rule). Caution zone jobs are defined as those typically involving exposure to any of 14 specific regulated risk factors related to awkward postures; high hand force; highly repetitive motions; repeated impact; heavy, frequent, or awkward lifting; and moderate to high hand arm vibration. WAC 296-62-05105. Significantly, an employer who

[4] Appellants have not briefed Assignment of Error 7 ("Issue Pertaining to Assignment of Error, number 5), and have therefore waived it. Additionally, this brief does not attempt to respond every allegation

reasonably determines there are no caution zone jobs in its workplace has no obligations under the rule. WAC 296-62-05103; (CES 56; AR 117686). L&I estimates that 78% of Washington employees are in jobs *not* covered by the rule, i.e. outside the caution zone. (CBA Appendix D, AR 118122).

The ergonomics rule imposes two duties upon employers with caution zone jobs. They must ensure that employees in caution zone jobs and their supervisors receive ergonomics awareness education. WAC 296-62-05120. These employers must also perform job analysis to determine whether caution zone jobs pose hazards. WAC 296-62-05130. Jobs with hazards are those having exposures of greater frequency, intensity or duration than caution zone jobs. They are specifically defined in WAC 296-62-05130 and WAC 296-62-05174. If an employer finds no hazardous exposures in caution zone jobs, the employer has no duty to reduce employee exposure to risk factors or to implement workplace changes. L&I estimates that only 12% of employees work in jobs with WMSD hazards. (CBA, Appendix D; AR 118122).

When an employer's job analysis shows employee exposures to risk factors above the hazard level, the employer must implement controls to reduce those exposures below the hazard level or to the degree feasible.

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made in WECARE's brief. A lack of response should not be deemed an admission of any of WECARE's allegations.

WAC 296-62-05130(5)(a). In this regard, the WMSD hazard level functions in the same way an exposure limit functions in other WISHA standards.[5]

In response to employer comments, L&I included two novel provisions in the rule to ease compliance. First, L&I adopted a "grandfather clause" that allows an employer to retain an existing ergonomics program as long as the program is "as effective" as compliance with the ergonomics rule would be. WAC 296-62-05110. No other safety and health rule contains such a provision. Second, L&I offered employers alternative means to comply. Employers may analyze jobs and identify hazards using the criteria in Appendix B. WAC 296-62-05130. Those who do so will be in full compliance with the ergonomics rule. Or employers may choose an alternative method for analyzing jobs to identify hazards, as long as the method is as effective asone of several widely used methods specified in the rule.[6] WAC 296-62-05130.

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[5] WAC 296-62-07355 (Ethylene Oxide), WAC 296-62-07521 (Lead), WAC 296-62-074 (Cadmium), WAC 296-62-09015 through 09055 (Hearing Conservation).

[6] WECARE claims none of the general criteria have been validated, but the reference they cite relates only to a 1993 review of the NIOSH lifting criteria. (BA 51). In fact the NIOSH lifting criteria were validated subsequent to this review. L&I explained in detail why it viewed

L&I provided an extended timetable for employers to comply with the ergonomics rule. WAC 296-62-05160. Depending upon the employer's size and standard industrial classification, the rule requires awareness education and analysis of caution zone jobs between July 1, 2002, and July 1, 2005, and requires elimination of hazardous exposures to the degree feasible between July 1, 2003, and July 1, 2006.

L&I recognized that factors other than workplace exposures may cause or contribute to musculoskeletal disorders and it is sometimes hard to determine whether reported injuries result from exposure to risk factors at work or elsewhere. It therefore structured the rule so employer duties are triggered only when hazards exist in the workplace. This "risk-based" approach to preventing workplace injuries is the approach taken in existing WISHA rules. L&I recognized that some employees may remain exposed to risk factors outside of work. L&I, however, made no effort to regulate these non-work exposures.

IV. SUMMARY OF ARGUMENT

The standard of review of APA "significant legislative rules" is arbitrary and capricious. WECARE's attempt to switch the burden of

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the lifting criteria as reasonable for identifying hazardous jobs (CES 85-86; AR 117715).

proof in APA rules challenges, and invent a new standard of review is contrary to legislative intent.

The ergonomics rule meets the rule-making requirements of the WISHA. WECARE's attempt to avoid both Washington and federal precedent interpreting these requirements should be rejected.

Throughout the rule-making process, L&I continually exceeded the requirements of the APA. The Concise Explanatory Statement, Cost Benefit Analysis, and well-documented rule-making file illustrate L&I's reasoning process and demonstrate a logical "path of reason."

V. ARGUMENT

A. The Arbitrary and Capricious Standard of Review Applies to this Matter.

The principal legal issue raised by WECARE's rules review challenge is the standard of judicial review for findings required by one of the 1995 amendments to the APA, RCW 34.05.328. L&I believes that the arbitrary and capricious standard of review included in the 1995 amendments to the APA, RCW 34.05.570(2) (c), as interpreted by this Court in *Neah Bay Chamber of Commerce v. Dep't of Fisheries*,119 Wn.2d 464, 832 P.2d 1310 (1992) (*Neah Bay)*, governs review of an agency's determinations under RCW 34.05.328. Under this standard of

review, this Court must uphold the ergonomics rule if L&I's determinations under RCW 34.05.328 followed a "path of reason."

At issue here are two 1995 amendments to the APA contained in the same bill. WECARE, relying on one of these amendments, RCW 34.05.328(2), invents a heightened standard of review with no precedent in administrative law. It would have the court apply a "reasonable person test" and switch the burden of proof to the agency (BA 14-15). Usually, when reviewing agency action under a heightened standard of review, courts apply the substantial evidence test. Yet, WECARE does not advocate reliance on that established administrative law standard. It weaves a new standard from whole cloth; it cites no authority in support of the standard it advocates. WECARE's goal is transparent – to avoid the effect of the substantial body of precedent applying the arbitrary and capricious standard to APA rules reviews, *see e.g., Neah Bay, Aviation West, Rios*. Indeed, WECARE implicitly concedes that its challenge would fail under either of these two established standards of review.

L&I believes that judicial review of the determinations required by the 1995 APA amendments are governed by the generally applicable, arbitrary and capricious standard in RCW 34.05.570. (all Washington RCWs cited in this brief are attached as Appendix 4) Under the arbitrary and capricious standard, as this Court explained in *Neah Bay*, L&I's

decision must be upheld "if the agency's path may reasonably be discerned." 119 Wn.2d at 471, *Aviation West*, 138 Wn.2d at 435. This court's analysis should begin "with the agency's explanation." It should then decide if the agency's reasoning is "plausible." *Id.*

Nothing in the 1995 APA amendments suggests the Legislature intended to supplant the otherwise applicable arbitrary and capricious standard of review with a different, heightened standard for review of significant legislative rules. RCW 34.05.328, by its terms, imposes an obligation on *the agency* to place adequate documentation in the rule-making file "so as to persuade a reasonable person" that the various "determinations" to be made by the agency before adopting a significant legislative rule are "justified." RCW 34.05.328(2). The findings accompanying the 1995 amendments make clear the Legislature intended to place a burden on *agencies* "to take a hard look" at a variety of issues, including costs and benefits, before adopting a rule.[7]

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[7] The relevant legislative finding states:

> (e) While it is the intent of the legislature that upon judicial review of a rule, a court should not substitute its judgment for that of an administrative agency, the court should determine whether the agency decision making was rigorous and deliberative; whether the agency reached its result through a process of reason; and *whether the agency took a hard look at the rule before its adoption . . . (emphasis supplied)* [1995 c 403 § 1.]

The agency's obligation under RCW 34.05.328 is to provide sufficient documentation in the rule-making file "to persuade a reasonable person" that its "determinations are justified." However, the test to determine whether the agency has met that obligation is the arbitrary and capricious standard set forth in RCW 34.05.570(2)(c).

The APA provides that subsequent legislation, such as the 1995 amendments, do not "supercede or modify" its provisions unless the intent to do so is express. RCW 34.05.020. Significantly, RCW 34.05.328(2) is silent on the question of judicial review, and speaks instead to *agency*, not court, action. Indeed, RCW 34.05.328 is included in the section of the APA that governs *agency duties* while developing a rule, RCW 34.05.300 *et. seq.*, not in the separate section of the APA that governs judicial review of agency determinations. RCW 34.05.500 *et. seq.* Therefore, RCW 34.05.328 does not "expressly" modify the generally applicable standard for judicial review of rules found in RCW 34.05.570(2).

1. TheLegislative History Supports Application of the Arbitrary and Capricious Standard.

The legislative history of the 1995 amendments provides further evidence that there was no intent to adopt a heightened standard of review for significant legislative rules. RCW 34.05.328 (significant legislative rules) was enacted, and RCW 34.05.570(2)(c) (review of rules), was

amended to include the arbitrary and capricious standard of review, by the same bill (Engrossed Substitute House Bill No. 1010). It would be illogical for the Legislature to use RCW 34.05.328 to amend RCW 34.05.570 in a bill that was already amending RCW 34.05.570. *See, King County v. Central Puget Sound Growth Management Hearings Bd.,* 142 Wn.2d 543, 14 P.3d 133 (2000) (The court reads legislation as a whole, and determines intent from considering the sections in relation to each other, and harmonized to ensure proper construction.). To the contrary, the legislative finding (2)(e) accompanying the 1995 amendments describe the standard of review it imposes in precisely the same language this court used in *Neah Bay,*

> [I]t is the intent of the legislature that upon judicial review of a rule, a court should not substitute its judgment for that of an administrative agency, the court should determine whether the agency decision making was rigorous and deliberative; whether the agency reached its result through *a process of reason*; and whether the *agency* took a hard look at the rule before adoption.
> (emphasis added)

The Legislative History of Bill 1010, is inconsistent with WECARE's argument. Senator Sheldon, the author of this section, intended to affirm this court's decision in *Neah Bay.*[8] Governor Lowry

[8] Senator Sheldon stated: "It is our intent in replacing the existing standard with the arbitrary and capricious standard to affirm the direction taken by the majority of our State Supreme Court in its 1992 decision Neah Bay Chamber of Commerce v. Department of Fisheries."*Journal of the Senate*, April 14, 1995, p.1302 (Appendix 5). A few days later identical language was read into the *House Journal* of April 18, 1995, p. 2708 (Appendix 5), by Representative Chandler.

relied on this intent in signing Bill 1010.[9] Neither mentioned a heightened standard of review. Thus, the legislative history provides no indication the Legislature intended a heightened standard of review. Rather, it confirms that the standard governing judicial review of rule-making, including the determinations required by the 1995 amendments for significant legislative rules, is the arbitrary and capricious standard applied in *Neah Bay* and subsequent cases.

2. WECARE's Standard of Review Changes the Burden of Proof.

Furthermore, the APA places the burden on WECARE to prove the ergonomics rule is invalid. RCW 34.05.570(1)(a). To prevail, they must show that the Agency was "willful and unreasoning," its regulatory action "taken without regard to the attending facts or circumstance." *Rios,* 145 Wn.2d at 501. If WECARE's argument were accepted, however, the burden would be shifted. For, if RCW 34.05.328(2) requires an agency to "persuade a reasonable person" (BA 14) that its rule was justified, it

[9]Additionally, in his partial veto of Bill 1010, Governor Lowry stated that he was only signing "section 802 which changes the standard of review of agency rules" based on his understanding that the standard would be as set forth in Neah Bay. House Journal, May 18, 1995, p. 3741 (Appendix 5). The Governor went on to note that RCW 34.05.570 could not be amended by reference through another part of the same bill (RCW 34.05.328). *Id.* Governor Lowry's comments reiterate the requirements of RCW 34.05.020. "In exercising the veto power, the Governor performs a legislative function and therefore must be considered to be acting as part of the Legislature." *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 213, 848 P.2d 1258 (1993).

would bear the burden of proof. The court, and not the agency would effectively decide regulatory policy issues, contravening the Legislative finding that under the 1995 amendments the court should not substitute its judgment for that of the agency. 1995c 403 §1 (e). Nothing in the 1995 amendments suggests the Legislature intended to shift the burden of proof in rules challenges, and RCW 34.05.020 requires such a clearly expressed intent to do so.

3. RCW 34.05.328 Imposes Additional Requirements on Agencies, but is not a new Standard of Review.

The 1995 APA amendments require agencies, before adopting a significant legislative rule, to make eight separate determinations not previously required under the APA. Only the determinations required by RCW 34.05.328(1)(a)-(g) are subject to judicial review. Review is limited to determining whether an agency's determinations follow a path of reason and are supported by evidence in the record. The requirements to determine whether a rule is needed, whether benefits exceed costs, and whether less burdensome alternatives exist to the rule are all analytic tools to be used by agencies. *See AFL-CIO v. Marshall*, 617 F.2d 636, 663 n. 152 (D.C. Cir. 1979) (describing a cost benefit analysis as a framework and set of procedures for organizing information), *aff'd American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 101 S. Ct. 2478, 69 L. Ed. 2d 185 (1981). It requires agencies to consider the economic impact of rules before regulating. It does not dictate an agency's regulatory choice.

Indeed, the Legislature made clear the 1995 amendments were not intended to diminish workplace safety and health. [10]

The language of RCW 34.05.328 speaks to what an agency must do to ensure its determinations have evidentiary support. RCW 34.05.328 imposes on agencies adopting significant legislative rules several obligations that do not apply to other rules. First, the agency must determine that the probable benefits exceed costs (and the other determinations required by 34.05.328). Second, agencies must justify determinations under RCW 34.05.328 with evidence in the record. Third, agencies must identify the evidence on which they rely to make determinations required by RCW 34.05.328.

This common sense interpretation of RCW 34.05.328, an interpretation grounded in the language of the statute, is more compatible with established administrative law doctrine than is the heightened standard of review advocated by WECARE. Under this common sense interpretation, the burden remains on the party challenging a rule to show why it is unreasonable; whereas WECARE would shift the burden of proof to the agency. In addition, under this common sense interpretation, courts continue to defer to agency expertise and policy judgments; whereas WECARE would have the court substitute its judgment for that of the agency, contrary to the Legislative findings previously cited.

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[10] Findings-Short title-Intent-1995 c 403:… (2)…it is the intent of the Legislature that….(g) Workplace Safety and health in this state not be diminished, whether provided by constitution, by statute, or by rule.

WECARE's substantive challenge to the cost benefit determination, but not to most of the other determinations required by RCW 34.05.328, illustrates yet another reason why the heightened standard of review it suggests should be rejected. The determination that benefits outweigh costs and an ergonomics standard is needed to protect workers is essentially a policy judgement. In making such a decision, RCW 34.05.328 requires L&I to consider factors beyond the quantified benefits and costs of the rule, such as qualitative benefits and the purpose of the statute. The weight assigned to these statutory factors cannot be verified by reference to data in the record in the same way that more tangible effects can be.

The stringent standard of review suggested by WECARE would make the agency's discretion to consider these issues illusory for it elevates costs, inherently easier to quantify and prove, over less easily quantified benefits. It would require the court to substitute its judgement for the agency's in balancing the risk to workers from not regulating against the risks to the economy from doing so. [11] The courts are ill-equipped to second guess an agency on these scientific, technical and

[11] RCW 34.05.328 permits L&I to take into account the goals of WISHA and to place "preeminent value" on protecting workers, *ATMI v. Donovan*, 452 U.S. at 540, risking error on the side of overprotection rather than under protection. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 656, 100 S. Ct. 2844, 65 L. Ed. 2d 1010 (1980). WECARE urges this court to take a different approach by giving added weight to the supposed increased unemployment it predicts likely from the ergonomics rule.

policy judgements. These issues deserve strong deference, and are inherently not susceptible to the type of verification that would be required under the standard of review WECARE proposes.[12] *See* William R. Andersen, *The 1988 Washington Administrative Procedure Act--An Inroduction,* 64 Wash. L. Rev. 781, 832 (1989), *cited with approval in Rios,*145 Wn.2d at 502 n.12 .

The ergonomics rule clearly meets both the arbitrary and capricious and the substantial evidence test because for every factual determination L&I made, it identified record evidence to support its approach and described its reasons for rejecting contrary evidence. It also meets even the unprecedented and ungrounded new "reasonable person test" as proposed by WECARE because the rule-making file supporting the ergonomics rule provides compelling scientific support for L&I's decisions. As we explain below, WECARE's factual critique fails under all three tests.

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[12] If, despite the above arguments, the Court nevertheless concludes a heightened standard of judicial review should apply to determinations required under RCW 34.05.328, L&I submits that the substantial evidence standard is more compatible with the APA than is the standard WECARE proposes. For example, federal law requires application of the substantial evidence standard to review of OSHA standard setting. *See generally, Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 474-75 (D.C. Cir. 1974); *AFL-CIO v. Marshall, 617 F.2d at 650; United Steelworkers of America v. Marshall,* 647 F.2d 1189, 1206 (D.C. Cir. 1980). Thus, a substantial body of caselaw exists to guide this Court in reviewing the "determinations" made by agencies pursuant to RCW 34.05.328.

B. The WISHA Provides Statutory Authority to Regulate WMSD Hazards.

In promulgating the ergonomics rule, L&I relied upon its authority under RCW 49.17.010, .020, .040 and .050**.** In interpreting the WISHA, this Court should give substantial weight to L&I's interpretation, since the Department is charged with its administration. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106, 103 S. Ct. 730, 74 L. Ed. 2d 954 (1983).

RCW 49.17.020 defines safety and health standard to include any rule "reasonably necessary or appropriate" to protect workers. In addition, RCW 49.17.050(1) authorizes the Director to adopt safety and health standards; and 49.17.050(4) provides for the promulgation of "health and safety standards *and* the control of . . . toxic materials and harmful physical agents." (emphasis added). 29 U.S.C § 653(8), which is essentially identical to 49.17.020 provides independent authority for OSHA regulation of safety hazards other than those posed by toxic materials and harmful physical agents. *See National Grain & Feed Ass'n v. OSHA*, 866 F.2d 717, 731 (5th Cir. 1988)*; International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991). These provisions, separately and together, provide ample authority for the ergonomics rules. On its face, RCW 49.17.050(4) authorizes L&I to promulgate any "safety and health

standard" *and* to regulate "harmful physical agents." This statutory authority has been used by L&I to adopt rules covering toxic materials (e.g., asbestos), harmful physical agents (e.g., ionizing radiation), and a wide variety of other hazards (e.g., working at heights, material handling, ladder safety, machine guarding). Despite this broad authority to regulate the full range of safety and health hazards, WECARE argues L&I may not regulate WMSD hazards because they are not "harmful physical agents" under RCW 49.17.050(4). (BA at 41)

WECARE apparently confuses the OSH Act, 29 U.S.C. § 655(b)(5), which applies only to regulation of toxic substances and harmful physical agents, with RCW 49.19.050(4), which is not so limited. [13] See *Rios*, 145 Wn.2d at 494-495 on differences between these OSHA and WISHA provisions.

[13] Under federal law, the distinction between a *health* standard governed by 29 § 655(b)(5) and a *safety* standard governed by 29 U.S.C. § 653(8) is relevant for limited reasons inapplicable to this case. When promulgating a health standard, OSHA must set the standard which best protects workers and is feasible. *ATMI v. Donovan* 452 U.S. at 540. When an OSHA health standard is challenged as insufficiently protective, a court may require OSHA to adopt a more stringent standard if workers remain exposed to significant risks. *Building and Const. Trades Dep't v. Brock*, 838 F.2d 1258, 1270-71 (D.C. Cir. 1988). Here, however, no party has urged a more stringent ergonomics standard, so the question of whether the mandatory duty to protect workers from health hazards, identified in *Rios*, extends to safety hazards is not before the court.

WECARE argues (BA 41-42) that the hazards governed by the rule are uniquely internal to the human body unlike other "external" hazards. This novel argument (which was not briefed below) is irrelevant and scientifically unfounded. All workplace hazards exert their effects through changes in the human body. Exposure to the external hazard of heat causes the heart to beat fast and blood pressure to rise. Noise, a form of vibration and one of WECARE's examples, causes damage by setting the bones and nerves of the inner ear in motion. This rule regulates jobs which cause similar changes within the human body. Highly repetitive motion, for example, results in friction and pressure on tendons and nerves.

Similarly, the fact that some physical activity is healthy (BA 42) is not relevant to the question of whether exposure to *hazardous levels* should be restricted.[14] Low level noise such as human speech is necessary for everyday life, but L&I may regulate exposure to *hazardous levels* of noise at work. *See, Forging Industry Ass'n v. Secretary of Labor*, 773 F.2d 1436 (4th Cir. 1985) (en banc).

[14] WECARE also claims (BA 42) that L&I's practice of using "work hardening" programs in workers' compensation cases belies the agencies position that the physical activities regulated are actually harmful. WAC 296-23-235 and L&I Provider Bulletin 90-06 allow the use of work hardening programs for workers who need to increase their strength and endurance to return to work, but they cannot be read to conclude that deliberately exposing workers to the hazards governed by the rule would be helpful or acceptable.

What is more, if WISHA were interpreted to preclude L&I from regulating hazards other than those caused by toxic exposures or harmful physical agents, the continued operation of Washington's state OSHA plan would be in jeopardy. 29 U.S.C. § 667. Since OSHA may clearly regulate these hazards, federal law requires that WISHA also authorize such regulation as a condition of continued operation of the state plan.

C. The Rulemaking Requirements of the WISHA Have Been Met Because the Rules is Reasonably Necessary and Appropriate, Feasible, Based on the Best Available Evidence, and Provides Protection to Workers Over the Course of Their Working Life.

The WISHA requires that rules promulgated by L&I be reasonably necessary or appropriate (RCW 49.17.020(7)), based on the best available evidence (RCW 49.17.050(4), technologically and economically feasible for affected industries (*id*.), and provide the maximum possible protection to workers over the course of their working life (*id*). *See*, also *Rios.*

The Court's task is to apply the APA scope of review to the WISHA's rulemaking requirements. The question before the court is whether L&I's decision that the statutory standards of RCW 49.17 had been met was arbitrary and capricious. *Rios*,145 Wn.2d at 501.

As this Court made clear in *Rios*:

> [W]e have registered agreement with Professor Andersen's opinion that "substantial judicial deference" should be accorded "when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise."

Rios at 502, n. 12. (*citing* Andersen, *supra)*. Further, "whether regulations are reasonable or appropriate is a question for the fact finder to determine on a case-by-case basis, subject to only limited review by this court." *Aviation West,* 138 Wn.2d at 432.

WECARE repeatedly attempts to recast the issues as to whether the rule-making requirements of the WISHA have been met into issues of first impression under the 1995 APA amendments. This court should reject WECARE's transparent attempt to both argue for a heightened standard of review of every issue in this matter, as well as to avoid this court's rulings under the WISHA and federal precedent under the OSHA. As we now show, every requirement of the WISHA has been met.

1. L&I Relied Upon the Best Available Evidence.

RCW 49.17.050(4) directs L&I to rely on the "best available evidence" in making its regulatory determinations. *Aviation West,* 138 Wn.2d at 436. Consistent with its statutory mandate to protect workers, this means it must act on the basis of the best information available to it, recognizing that this data may be incomplete. Accord, *United Steelworkers v. Marshall,* 647 F.2d 1189, 1266 (D.C. Cir 1980). *See also Industrial Union Dept v. American Petroleum Inst*., 448 U.S. 607, 656 (1980). The requirement to act on the basis of the "best available evidence" was not intended to constrain L&I, but "to permit the agency to act immediately when contemporary science does not fully comprehend how the disease develops." *United Steelworkers v. Marshall,* 647 F.2d at

1228 n. 54 *citing AFL-CIO v. Marshall*, 617 F.2d 636, 650 (D.C. Cir. 1979).

This Court addressed the issue of "best available evidence" in *Aviation West* when it upheld L&I's regulation of environmental tobacco smoke (ETS). The court observed that its review of the best available evidence requirement is "to a large extent . . . redundant" with its review under *Neah Bay* of the factors relied upon by the agency and the quality of the agency's reasoning. 138 Wn.2d at 436. In other words, if an agency is not using the best available evidence, then its decision will be arbitrary and capricious.

The basic premise of WECARE's argument – that L&I must wait for better evidence so it can persuade a reasonable person a rule is needed – has no statutory basis in the WISHA. "Rather than directing the agency to wait for the best evidence, the [WISHA] requires the agency to develop standards based on the best available evidence." *AFL-CIO v. Marshall, 617 F.2d at 657-58.* L&I is not required to "await the Godot of scientific certainty." *United Steelworkers*, 647 F.2d at 1266. WECARE nevertheless argues that the evidence on which L&I relies is not good enough. However, throughout their brief they cite the 1995 APA amendments as authority for imposing this unprecedented burden on L&I, not the

WISHA. They characterize the argument as arising under the WISHA, but premise the claim that L&I must wait for more definitive studies before regulating on the language of RCW 34.05.328.

2. The Rule is Reasonably Necessary and Appropriate; Compelling Scientific Evidence Shows Exposure to Risk Factors Is Causally Related to a Widespread Incidence of WMSDs.

The WISHA requires L&I to determine that a rule is "reasonably necessary and appropriate" before regulating. RCW 49.17.020(7). Workers suffering from WMSDs often experience debilitating, crippling pain, limiting their ability to work and conduct their daily lives. Workers with WMSDs experience "pain, motor weakness, sensory deficits and restricted ranges of motion." (CES 13; AR 117643). L&I concluded WMSDs represent a material impairment of worker health (CES 10-11; AR 117641-117642). Under *Rios* it had a mandatory duty to prevent them.

L&I determined there is "strong scientific evidence that jobs and tasks with various physical risk factors expose workers to preventable hazards that can cause or aggravate WMSDs." (CES 15, AR 117645). Contrary to BA at 41, the rule regulates only hazardous exposures, not simple physical activity. L&I relied upon a strong cumulative body of many high quality studies to conclude that exposure to the regulated risk factors causes WMSDS. L&I looked to three sources of information: (1)

observations of actual cases of WMSDs, (2) the conclusions of expert federal agencies, and (3) its own analysis of the scientific evidence. First, L&I relied on "allowed" workers' compensation claims for WMSDs. These claims represent only those cases acknowledged by an employer, or adjudicated, to be work-related. Washington's workers' compensation database is unique because the state provides insurance to employers that in most other jurisdictions is provided by private insurers. As a result, the state collects comprehensive data about work-related injuries and illnesses. No similar federal database exists, and there is no national requirement for insurers to report workers' compensation data. Therefore, the workers' compensation data on which L&I relied was the best available. Each year, the state workers' compensation fund and self-insured employers pay for more than 52,000 such claims (CES 32, AR 117662).

Second, L&I relied on two comprehensive reports analyzing the scientific literature on musculoskeletal disorders prepared by the National Academy of Sciences (NAS) (AR 112608-112839) and the National Institute for Occupational Safety & Health (NIOSH) (AR 202281-202872).[15] NAS concluded, based on a symposium of 74

[15] NIOSH is the principal federal agency charged with research on occupational safety and health issues. *See* 29 U.S.C. § 669.

scientists, that "the positive relationship between musculoskeletal disorders and the conduct of work is clear." (CES 17, AR 117647; 112509).

NIOSH also found a strong association between WMSDs and risk factors at work. After looking at over 600 epidemiology studies, NIOSH published a comprehensive review of the scientific literature in 1997. NIOSH concluded that "a substantial body of credible epidemiologic research provides strong evidence of an association between musculoskeletal disorders and certain work-related physical factors when there are high levels of exposure . ." (CES 16; AR 117646). The Director of NIOSH, Dr. Linda Rosenstock, testifying at L&I's public hearing, reiterated NIOSH's conclusion, stating "NIOSH has amassed research and experience that establishes a clear relationship between workplace hazards and MSDs." (CES 6; AR 117636).

Third, L&I also reviewed over 600 epidemiology studies, including many published subsequent to the NAS and NIOSH reviews, to determine whether risk factors at work cause or aggravate WMSDs. It chose this body of scientific studies—which includes many studies showing a positive association between WMSDs and work and some showing no such association—because it represents the "best available

evidence" regarding the relationship between WMSDs and various causative factors.

L&I found compelling scientific evidence of a strong association between the regulated risk factors and WMSDs. It explained in detail its reasons for doing so. (CES 17-30; AR 117647-117660). For each risk factor in the rule, L&I identified well-designed, peer-reviewed, published studies on which it relied. (CES 73-105; AR 117703-117735). L&I's scientific conclusions mirror those of the NAS and NIOSH.

L&I recognized there was evidence of non-work causes of musculoskeletal disorders, negative studies that showed no association between work and these disorders, and limits in the study design of some positive studies. L&I rejected the notion that these data limitations undermined its conclusion that WMSDs were associated with risk factors at work. (CES 25-30; AR 117655-117660). L&I concluded that "neither the methodological limits of individual studies nor their inconclusive results detract from the overall finding of harm." (CES 9; AR 117639).

The agency's judgment and reasoning process described above has substantial support in the scientific literature and should be upheld. *Aviation West*, 138 Wn.2d at 432. First, as noted, L&I counted the number of WMSDs recognized as work-related under RCW 51. Courts have repeatedly recognized that when OSHA observes actual cases of

injury and illness related to workplace exposures, additional experimental studies of cause and effect are not necessary.[16] Second, as described above, L&I also relied on the conclusions of two expert federal agencies—NIOSH and NAS. In *Aviation West*, 138 Wn.2d at 426, this Court held L&I acted properly when it relied upon the expert opinion of the Environmental Protection Agency (EPA) to regulate tobacco smoke. The Court observed that "choosing not to reinvent the wheel and instead relying upon existing studies that are directly on point appears to us to be a reasonable decision." *Id.* Federal courts have likewise upheld OSHA regulation premised on the scientific opinions of other agencies.[17]

Here, L&I relied on comprehensive surveys of the scientific data completed by the NAS and NIOSH. Both concluded that the regulated risk factors are associated with increased harm among exposed workers.

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[16] *See e.g., International Union, UAW v. OSHA*, 938 F.2d at 1316 (OSHA counted the number of accidents reported to the Bureau of Labor Statistics to justify lockout regulation); *National Grain & Feed Ass'n v. OSHA*, 866 F.2d 717 (5th Cir. 1989) (OSHA supported regulation of dust levels in grain elevators based on reports of injuries and fatalities following grain elevator explosions); *American Dental Association v. Martin*, 984 F.2d 823 (7th Cir. 1993) (OSHA justified regulation of bloodborne pathogens by counting the number of health care workers with hepatitis).

[17] *See e.g., Forging Industry Ass'n v. Secretary of Labor*, 773 F.2d 1436 (4th Cir. 1985)(en banc) *cited with approval in Aviation West* (court approves OSHA's reliance on studies conducted by other agencies); *Public Citizen v. Tyson*, 796 F.2d at 1504-06 (OSHA's judgement was consistent with outside scientific opinion).

The body of scientific studies that NIOSH and NAS surveyed is far more substantial than the evidence found adequate to require regulation in *Rios* or to justify it in *Aviation West.*[18] The NIOSH and NAS reports represent a reasonable body of scientific thought on which L&I properly may rely to justify regulation. *See Aviation West*, 138 Wn.2d at 438. *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. at 655. Third, even though L&I would have been justified in relying solely on Washington's workers' compensation experience with WMSDs or upon the expert scientific reviews of two federal agencies, it also conducted a thorough review of hundreds of epidemiology studies, identifying the studies it found persuasive and the reasons for rejecting contrary evidence. Based on this comprehensive scientific analysis, L&I determined that the regulated risk factors are associated with increased risk of WMSDs. This expert judgement that the scientific data provided compelling evidence of a causal link between the regulated risk factors and WMSDs is entitled to deference. Based on the above, it can hardly be said that L&I's decision that the rule was "reasonably necessary and appropriate" was arbitrary and capricious. Further, this decision was made using the best available evidence.

[18] The report relied upon by this court in *Rios* is attached as appendix 6.

3. WECARE's Contention that the Best Available Evidence Standard requires Randomized Controlled Trials is Unfounded.

Initially, we note that this Court need not reach the question of whether epidemiology studies standing alone are adequate to support the ergonomics rule. Here, L&I had two other independent bases for finding that the regulated risk factors are causally linked to WMSDs: Washington workers' compensation data and two reports from expert federal agencies. Only if the court concludes that neither of these sources of data, alone or in combination, provide adequate support for L&I's conclusion that risk factors are related to WMSDs should the Court reach WECARE's argument on whether epidemiology evidence alone can support regulation.

WECARE incorrectly claims that L&I relied "almost exclusively" on epidemiology studies, and argues that such studies, no matter how numerous, can never support regulation, because randomized controlled trials (RCTs) are better. This argument should be rejected for two reasons: (1) it wrongly assumes that a "reasonable person" standard of review applies, while in fact this standard would apply, if at all, only to determinations required by RCW 34.05.328, (not WISHA determinations), and (2) they misrepresent the nature of scientific evidence.

WECARE attacks L&I's use of epidemiology as not being the "best available evidence." Epidemiology is an established scientific discipline that studies the incidence and distribution of diseases or injuries

in populations rather than individuals. Epidemiological studies, like other scientific studies, examine cause and effect. Individual studies, or the cumulative impact of many studies, may provide compelling evidence of an association between disease and exposure. (CES 7-8; AR 117637-117638).

Courts have recognized that epidemiological studies of the types relied upon by L&I provide a firm foundation for workplace safety and health regulation. WECARE is wrong to suggest otherwise. In *Aviation West*, this Court approved L&I's reliance solely on epidemiology evidence to show that exposure to ETS was cancerous. In *Aviation West,* 138 Wn.2d at 426, eleven epidemiology studies of ETS exposure among the wives of smokers showed elevated lung cancer risks. EPA, surveying this body of epidemiology studies, concluded ETS was a probable lung carcinogen. In rejecting the tobacco companies' arguments that their evidence was better than the EPA's, this Court noted "the court must not second-guess the way the agency chooses to weigh the conflicting evidence or resolve the dispute." 138 Wn.2d at 429 (quoting *United Steelworkers, supra,* 647 F.2d at 1263*).* A conclusion that such a body of epidemiological evidence is inadequate to support this rule would effectively overturn *Aviation West*[19].

[19] WECARE is incorrect when they suggest (BA 45) that *Aviation West* can be distinguished because the EPA report consisted of a

This Court's decision in *Aviation West* is in accord with those of the federal courts, which have repeatedly approved OSHA's reliance on a body of epidemiologic evidence to demonstrate health risks to workers.[20] Indeed, the DC circuit has observed in commenting on the nature of epidemiological evidence, that:

> [OSHA's] decision may be fully supportable if it is based . . . on the inconclusive but suggestive results of numerous studies. By its nature, scientific evidence is cumulative: the more supporting, albeit inconclusive evidence available, the more likely the accuracy of the conclusion.

Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1495 (D.C. Cir. 1986) (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 37-8 (D.C. Cir. 1976). Thus, the D.C. Circuit upheld OSHA regulation of ethylene oxide, even though no single study proved it carcinogenic, because "the

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combination of studies of which epidemiology constituted only a part. In *Aviation West*, the EPA review consisted of only epidemiology studies. The NIOSH and NAS studies used in this case by L&I are stronger evidence of a risk to workers than was the EPA's report on ETS. WECARE's attempt to similarly distinguish *Rios* also fails (BA 45). The Technical Advisory Group report referenced by the Court in *Rios* as a compelling basis for agency action (Appendix 6) was far less thorough than the NAS and NIOSH reports.

[20] For example, the Ninth Circuit, in *Asarco, Inc. v. OSHA*, 746 F.2d 483, 496-98 (9th Cir. 1984) upheld regulation of arsenic based on epidemiology studies showing it causes cancer in workers exposed at high doses. Indeed, epidemiology studies are the basis for linking asbestos to cancer and pulmonary disease. *Building & Construction Trades Dept v. Brock*, 838 F.2d 1258 (D.C. Cir 1988). *See also International Union, UAW v. OSHA*, 878 F.2d 389, 393 (D.C. Cir. 1989)(epidemiology studies usually the preferred method of identifying risks to workers). While limited animal evidence existed in both cases, OSHA did not rely on it to support its finding that arsenic and asbestos cause cancer.

cumulative evidence is compelling." *Id.* at 1489.[21] WECARE criticizes L&I's decision to rely upon hundreds of epidemiology studies instead of prospective randomized control trials (RCTs), asserting that RCTs are both fundamentally different from and inherently superior to epidemiology. WECARE's logic is flawed. In fact, RCTs are simply one of many types of epidemiology study that L&I might consider.[22] RCTS, like other epidemiology studies, can be well done or poorly done.

RCTs in human populations have never been required for identifying workplace hazards. Indeed, WECARE cites no OSHA or DLI regulatory proceeding where they have been relied upon at all, much less insisted upon to the exclusion of other epidemiological evidence. Neither

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[21] WECARE seeks to distinguish this case arguing that OSHA relied on more than just epidemiology to regulate ethylene oxide. True, OSHA also pointed to studies showing rats got cancer at high doses, but while these may have been useful corroboration, OSHA could still have regulated in the absence of such animal data. Similarly, L&I relied on more than just epidemiology. It relied on Washington workers' compensation data as well as the conclusions of two expert federal panels. Both these sources of data were consistent with L&I's interpretation of the epidemiology evidence. Further, L&I did consider animal and human laboratory studies. CES 19, 20, 74, 82, 83; AR 117649, 117650, 117704, 117712, 117713.

[22] RCTs compare the incidence of disease among a group of people exposed to a potential hazard with a randomly selected unexposed control group. RCTs are listed as examples of epidemiologic study design in authoritative texts such as David G. Kleinbaum et al., Epidemiologic Research: Principles and Quantitative Methods (1982); Kenneth J. Rothman, Modern Epidemiology (Sander Greenland ed., 2d ed. 1998), and Richard R. Monson, Occupational Epidemiology (2d ed. 1990).

NIOSH nor the NAS viewed the lack of RCTs as an obstacle to concluding that WMSDs were associated with increased exposure to risk factors.

Despite WECARE's long discussion of RCTs, not a single randomized controlled trial has been identified by L&I or brought to the agency's attention that is inconsistent with L&I's scientific conclusions or the rule's requirements. The agency was required to regulate ergonomic risks on the basis of the evidence before it. Under the "best available evidence" standard, the ergonomics rule cannot be invalidated because WECARE can imagine some studies that might provide stronger evidence of cause and effect relationships. DLI is not required to address the merits of hypothetical evidence or the "best conceivable evidence." WECARE is really saying the agency must wait for a study that does not exist.

Further, WECARE's repeated claim that L&I ignored "contradictory" RCTs (BA 43) is not true. The only three RCTs brought forward by WECARE have been reviewed by L&I and determined to have little bearing on this case. One study (Malmivaara), (BA 47) shows that ordinary activity promotes recovery from back injury. It does not speak to the cause or prevention of back injury. Nor does it contradict L&I's decision to regulate exposure to extraordinary, hazardous activities.

The second study (Gundewall), (BA 47) shows that exercise training can reduce the incidence of back injury. L&I agrees that physical activity is typically healthful if it does not exceed specifically hazardous

levels of exposure. The rule does not prohibit exercise training and is not in any way contradicted by the Gundewall findings. A third study (Daltroy), (BA 48) is offered as evidence that preventive education programs do not reduce back injury rates. L&I agrees that education alone, in the absence of measures to identify and reduce hazardous exposures, will not prevent injuries. The Daltroy findings do not contradict L&I's conclusions about the causes of WMSDs or the effect of ergonomic controls in preventing them. WECARE's contention that L&I ignored the best available evidence must fail.

4. As Part of its Determination that the Rule was Reasonably Necessary and Appropriate, L&I Identified a Dose-Response Relationship Between Exposure to Risk Factors and WMSDs.

WECARE incorrectly argues at BA 49-51 that the rule is not reasonably necessary and appropriate because L&I did not "offer evidence of a dose-response relationship." L&I observed a dose-response relationship between increased exposure to risk factors and increased incidence of WMSDs. (CES 43-44; AR 117673-117674 and CES, B1-B4; AR 117759-117762). For each risk factor, L&I identified scientific studies showing dose-response patterns for exposure to risk factors and the incidence of WMSDs. (CES 73-105; AR 117704-117735). In each case, L&I found an increasing incidence of WMSDs with increasing exposure to a risk factor. L&I's analysis of the dose-response data is similar to

NIOSH's view, reached after it surveyed the scientific literature, that "the greater the level of exposure to a single risk factor or combination of factors, the greater the risk of having a work-related musculoskeletal disorder." (CES 43; AR 117673).

The NAS reached a similar conclusion, finding "there is compelling evidence from numerous studies that as the amount of biomechanical stress is reduced, the prevalence of musculoskeletal disorders at the affected body region is likewise reduced." (CES 46; AR 117676).

WECARE's argument as to dose-response relationships fails for two reasons. First, significantly, they cite no authority purporting to impose such a duty. Second, L&I did a quantitative dose-response analysis and found convincing evidence of a positive relationship.

In *Benzene*, the U.S. Supreme Court held that before OSHA could promulgate a standard, it must show that the hazard it seeks to regulate is "significant" and that the rule it adopts will reduce or eliminate the significant risk. To meet this test, OSHA sometimes constructs a dose-response curve when it must extrapolate from animal data or high exposure studies to predict workplace effects. Occupational Safety & Health Law 452-53 (Randy S. Rabinowitz ed., 2d ed. 2002). Courts do not require OSHA to construct a dose-response curve where it can directly

observe the number of actual cases of work-related injury and illness and, thus, has no need to extrapolate to predict workplace risks.[23]

But even if WECARE was correct that *Benzene* requires OSHA to do a quantitative dose-response analysis, this Court held that the *Benzene* standard does not apply in Washington. *Aviation West*, 138 Wn.2d at 432, 434. Thus, any federal requirement to establish a dose-response relationship, even if one exists, does not apply under the WISHA.

Even though L&I was not required to do so, it did a dose-response analysis and found convincing evidence of a positive relationship for each risk factor. Therefore, L&I fully complied with any obligation to show that reducing exposures to risk factors associated with WMSDs will reduce the incidence of injuries among exposed workers.

WECARE seems to suggest (BA 49) that L&I must conduct separate dose-response analyses for all exposures to risk factors, including

[23] In *Aviation West*, 138 Wn.2d at 434, this Court rejected a similar argument that ETS could not be regulated until a dose-response analysis was completed. Other courts have affirmed OSHA rules where the Agency did not construct a dose response curve. *See also, National Grain & Feed Ass'n v. OSHA*, 866 F.2d 717 (5th Cir. 1989)(since accumulated grain dust contributes to explosions, a rule that reduces grain dust is likely to reduce explosions); *Alabama Power v. OSHA*, 89 F.3d 740, 745 (11th Cir. 1996)(videotape showing that work clothes were flammable enough to establish significant risk; no dose-response curve required); *International Union, UAW v. OSHA*, 938 F.2d 1310 (OSHA estimates placing locks on hazardous machinery will be 90% effective in reducing accidents, but using tags without locks will be only 80% effective; no scientifically validated evidence is required to support those estimates).

non-workplace exposures. WECARE does not explain why this analysis would be useful, nor does it cite any authority for this proposition. WECARE suggests that since WMSDs may also be caused by exposures outside work, L&I may not regulate occupational exposure to hazards unless it can differentiate those illnesses originating in the workplace from those caused by non-occupational exposures. This argument too must be rejected. L&I regulates many hazards that workers encounter both at work and away from work.[24]

The leading case on the issue is *Forging Industry Association v. Secretary*, 773 F.2d 1436, where industry argued that OSHA exceeded its authority by regulating noise because hearing loss can also be caused by aging and exposures away from work. The court rejected the argument, upholding OSHA's standard because it did no more than ensure that a hearing endangered worker is provided with protection in the workplace to decrease the risk of a hearing impairment. 773 F.2d at 1443. Here, L&I carefully limited its rule so it regulates only hazardous workplace exposures to risk factors associated with WMSDs. Therefore, the rule is both reasonably necessary and appropriate.

[24] Chemical workers may inhale benzene at work and also when they use a self-service gas station. (WAC 296-62-07523) Hospital workers exposed to bloodborne pathogens in body fluids at work may also be exposed to body fluids outside of work during sexual encounters. (WAC 296-62-08001) Asbestos workers may face additional risks for lung cancer, such as tobacco smoke, away from work. (WAC 296-62-077).

5. The Rule Meets the Statutory Requirements of being Feasible and Providing Protection to Workers Throughout their Working Life.

The WISHA requires that standards be feasible. RCW 49.17.050(4). L&I determined the ergonomics rule is both technologically and economically feasible.

The rulemaking file establishes that technology widely available and in general use will allow employers to comply with the rule. (CES 108-126; AR 117738-117756). The rule's extended implementation timetable gives employers more time to comply than any previous L&I rule, and ensures employers have an adequate opportunity to adapt existing technology, as needed, to achieve compliance.

L&I also determined that the rule was economically feasible for affected industries by calculating the cost of complying with the rule. L&I first estimated the number of affected employers and the proportion of employers and establishments with caution zone and hazard jobs.

L&I multiplied the number of caution zone or hazard jobs by the unit costs of each applicable step under the provisions of the rule. The principal source of data for L&I's unit cost estimates for engineering and administrative controls was OSHA's Preliminary Economic Impact

Analysis. (CBA at 15-16; AR 118042-118043).[25] L&I then multiplied these unit costs by the number of affected establishments in each industry to calculate compliance costs.

Amortized, annual compliance costs expressed as a percent of profit ranged from 2.52% in agriculture to 0.1% in retail trade (CBA 31; AR 118058). Compliance costs expressed as a percentage of sales, the appropriate measure if industry passed its costs onto consumers, ranged from 0.117% in agriculture, to 0.01% in retail trade (CBA 31; AR 118058). L&I predicted that affected industries would partially absorb these costs and raise prices to recoup remaining costs. L&I determined that in either case, "there is no evidence that the rule will have a significant impact on business sales and profits or on the prices customers encounter for goods and services." (CBA 30; AR 118057). Thus, the rule is feasible.

Finally, RCW 49.17.050(4) requires that any rule assure that "no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard ….for the period

[25] When L&I published its proposed rule in October 1999, OSHA's 1995 PEA was the most recent available. L&I used data from that PEA to estimate the unit costs of control in the Small Business Economic Impact Analysis that accompanied the proposed rule. Later, in November 1999, OSHA published a revised PEA. Contrary to

of his working life." In *Rios,* 145 Wn.2d at 496-499, this court emphasized the strong duty the above language places on L&I to enact rules that protect workers to the extent feasible. While it is understandable why WECARE's brief never mentions this statutory duty, L&I is required to comply with all of the rule-making provisions of the WISHA. As noted at BA 50, the rule carefully links the limits of an employer's duties to feasibility.[26]

As the foregoing discussion makes clear, L&I carefully complied with all of the rule-making requirements of the WISHA. Its reasoning process in doing so is spelled out in the CES (and supported by the rule-making file), and is based on a clear "path of reason."

Before adopting the rule, L&I carefully reviewed hundreds of scientific studies and identified those on which it relied to conclude that WMSDs are causally related to risk factors at work. L&I explained its decisions in detail. The Agency took a "hard look" at the scientific evidence, and its conclusion that the ergonomics rule has a sound

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WECARE's claim, that economic analysis was placed in the rule-making file. L&I used data from this more recent PEA in completing the CBA.

[26] WE CARE also argues at BA 50 that there is no scientific basis for the hazard levels set in Appendix B of the rule. Pages 73-105 of the CES carefully explain the scientific basis for each level set in the rule.

scientific basis was reached through a "process of reason" and therefore should not be disturbed by this Court. *Aviation West*, 138 Wn.2d at 432.

D. L & I Met or Exceeded the Requirements of the APA

Throughout the rule-making process, L&I continually exceeded both the procedural and substantive requirements of the APA. For example, before announcing the proposed rule, L&I held a series of "Rule Development Conferences" around the state to obtain public input. (AR Vol. 1, 100156 through Vol. 5 of rules file). L&I sought input from two "Ergonomics Rule Making Advisory Committees." (*See*, generally, Vols. 9-11 of the rule file). Neither of these processes is required by the APA.

The proposed rule was published in the Washington State Register on 12/1/99. In compliance with RCW 34.05.320, it was accompanied by a statement of reasons supporting the proposal, a statement that it was a significant legislative rule, and a small business economic impact statement. L&I also included a lengthy supplemental statement not required by the APA explaining why the rule was being proposed and the scientific basis for the rule. (AR 116831-116870) Additionally, at the time the rule was proposed, L&I placed 75 technical and scientific references in the rule-making file for public review. It then held fourteen public hearings around the state, more than is required by the APA.

Following the public hearings, L&I revised the rule based on public input, and carefully responded to every public comment. (CES, Appendices C & D; AR 117763-118025). It prepared a 393-page CES (including appendices) and a separate 64-page Cost Benefit Analysis (CBA) detailing the agency's reasoning process. RCW 34.05.328 does not require an agency to prepare a separate formal written cost benefit document, but only to make a "*determination* that the probable benefits of the rule are greater than its probable costs." Finally, L&I carefully compiled a rule-making file that is close to 100,000 pages long that clearly exceeds any documentation requirements in either RCW 34.05.328 or anywhere else in the APA.

1. The Determination That Benefits Exceed Costs is Justified.

RCW 34.05.328 requires the agency *to determine* whether "probable benefits" of ergonomic regulation exceed the "probable costs." This statute directs L&I, in deciding whether benefits exceed costs, to look not only at quantified benefits and costs, but also at non-quantifiable benefits and the specific directives of the statute being implemented, here, WISHA's mandatory duty to protect workers. L&I found the quantifiable benefits of ergonomic regulation exceed costs by a ratio of 4.24 to one. (CBA 61; AR 118088). L&I identified several social benefits from

ergonomic regulation that it could not quantify and thus are not reflected in the ratio. Taking those factors into account, the benefits of the rule tilt even more strongly in favor of regulation. (CBA 52-59; AR 118079-118086).

The determination required by RCW 34.05.328 differs little from the analysis required of L&I under the WISHA. RCW 34.05.328 does not require precise calculation of regulatory costs, only an estimate of probable costs. L&I was already required to determine the probable costs of regulation to show that its rules are economically feasible. *Rios,* 145 Wn.2d at 497-498**.** In making such an estimate, the courts "probably cannot expect hard and precise estimates of costs" particularly where, as here, industry did not provide L&I access to economic data. *ATMI v. Donovan*, 452 U.S. at 528-29. (cited with approval in *Rios,* 145 Wn.2d at 497-499). Nor is L&I required to engage in massive data collection of its own. Instead, it can rely on data and estimates prepared by others, making adjustments to those estimates where appropriate. *United Steelworkers v. Marshall*, 647 F.2d at 1266-67. *ATMI v. Donovan*, 452 U.S. at 527-28. *See also, Aviation West.*

To complete the cost component of the cost benefit equation, L&I relied on its estimate of the probable costs of the ergonomics rule, which was part of its assessment of economic feasibility under the WISHA.

L&I also estimated the probable benefits of the ergonomics rule. To estimate the number of WMSDs likely in the absence of regulation, L&I relied on workers' compensation statistics it periodically publishes. L&I selected the 2000 publication and analyzed data for 1995-1997, the most recent years for which complete information was available.[27] It adjusted that data to reflect medical claims filed with self-insured employers that are not otherwise reported to L&I (CBA 35). L&I determined that in the absence of the ergonomics rule, 68,146 WMSDs were likely to occur annually. (CBA 35; AR 118061) L&I estimated the total annual cost of these WMSDs at $1.1 billion (CBA 41).

L&I determined that ergonomic interventions will reduce the incidence of WMSDs by 40% and their associated costs by 50%. (CBA 50; AR 118077). L&I estimated the effectiveness of the ergonomics rule using two separate analyses, each of which produced similar results and conclusions. First, L&I reviewed hundreds of epidemiological studies, identifying "methodologically sound studies that estimated the

[27] WECARE questions L&I's use of data from the 2000 report, arguing that nothing in the record shows that L&I relied upon this data. (BA 30). The 2000 report is used throughout the CES in L&I's analysis of WMSD claims. (CES 31, 32, 37) and is included in the CES reference list. The 2000 publication is also cited in the CBA (CBA 37; AR 118064) and used in the CBA analysis. 1998 data, although included in the 2000 report, was not used in the CBA because some of the claims from that year were still open and their exact outcomes had not been determined.

quantitative relationship between observable workplace exposures and the occurrence of WMSDs." (CES 73-105; AR 117703-117735 & CBA 46-50; AR 118073-118077). This analysis showed an average reduction in WMSD rates across all risk factors of 50% when exposure was reduced from the hazard level to the caution zone level.

Second, L&I supplemented this scientific analysis of the literature with a review of 63 publications reporting practical experience with workplace ergonomic interventions and including detailed information on WMSD claims, lost work days or claims costs. (CBA 46; AR 118073). The observed average reduction in the number of WMSDs was 50%, and the average reduction in WMSD costs was 64%. L&I's decision to assume only 40% reductions in WMSD injuries and 50% reduction in costs was made to ensure that any error in the estimate of benefits would be an underestimate.

RCW 34.05.328 did not fundamentally change how L&I estimates the benefits of its rules. The WISHA requires that it demonstrate the hazard it proposes to regulate is sufficiently widespread or severe to warrant government intervention and that its rule will "materially reduce" the hazard. (CES at 10; AR 117640). This showing produces an estimate of probable benefits. Some of these benefits can be quantified; other benefits cannot be quantified and L&I describes these benefits qualitatively. The requirement to describe the benefits of a rule is not a "mathematical straightjacket." *Industrial Union Dep't. v. American Petroleum Inst.*, 448 U.S. at 655. Certainly, L&I is not required to support

its estimate with "anything approaching scientific certainty." *Id.* at 656. Thus, the estimate of probable benefits and the estimate of probable costs required by the APA mirror existing requirements under the WISHA.

However, RCW 34.05.328 adds a new element to L&I's analysis—it requires L&I to compare benefits and costs and to determine whether the former exceed the latter. In making this determination, the Legislature directed L&I to act in accordance with its statutory mandate and made clear that workplace health and safety should not be diminished. RCW 34.05.328-findings. Thus, the APA permits L&I to place "preeminent value" on protecting workers, *ATMI v. Donovan*, 452 U.S. at 540, risking error on the side of overprotection rather than under protection. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. at 656.

WECARE does not challenge L&I's finding that the benefits of ergonomics regulation exceed its costs, the only determination required by the statute. Instead, WECARE challenges L&I's calculation of costs, claiming they are too low, and its calculation of benefits, claiming they are too high. They do not offer alternate cost or benefit calculations.[28] They

[28] While WECARE has not provided any alternate cost or benefit analysis, they cite a single cost estimate submitted to the rulemaking file, an assessment of L&I's small business economic impact statement by M.Cubed, a consulting firm retained by the Association of Washington Business. L&I carefully considered this document and explained its reasons for concluding that it could not be relied upon because of numerous severe flaws (CES D2-13 to D2-20). In particular, L&I rejected WECARE's assertion that the M Cubed report provided the best available evidence of the actual costs of ergonomic controls in the trucking industry. (BA 36) In fact, this submission merely contained industry self estimates of the cost of the proposed California ergonomics standard, which have

do not identify record evidence on which L&I should have relied instead to obtain supposedly better estimates. They do not allege nor offer evidence to suggest that cost benefit calculations using their preferred approach would yield a cost benefit ratio substantially different from that upon which L&I relied, and which heavily favors regulation of ergonomic hazards. They do not allege that L&I completed its cost benefit analysis in bad faith. Accordingly, WECARE's challenge to the cost benefit determination fails.

L&I's detailed estimate of the costs of complying with the ergonomics rule relied on a 1998 survey of Washington employers to estimate the population exposed to the regulated risk factors. WECARE criticizes this survey, arguing that the response rate was too low, and that the risks about which employers were questioned differed from those L&I regulated.[29] (BA 23-24) Each claim lacks merit.

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nothing to do with the cost of compliance with the fundamentally different Washington rule. No other "actual costs" were submitted to the record .

[29] WECARE claims that two specific differences in questions on the survey and the corresponding regulated risk factors led L&I to underestimate the number of jobs affected and therefore underestimate the costs of compliance. (BA 22) However, in both cases these differences actually would have resulted in overestimating the number of jobs and costs. The survey asked about lifting 10 pounds more than once a minute and the rule applies to the smaller subset of jobs with lifting 10 pounds more than twice a minute. Similarly the survey asked about lifting or lowering objects in various awkward positions while the rule applies to the smaller subset of jobs handling more than 25 pounds more than 25 times a day in these postures. (WECARE incorrectly states that L&I estimated the number of these lifting jobs by using the survey question on carrying heavy loads for seven or more feet). (Compare AR 118104 with WAC 296-62-05105).

Seventy five percent of employers who received L&I's survey responded to it, an exceptionally high rate of response for survey research. L&I concluded that this response was adequate to provide a representative sample of exposures across affected industries, and WECARE cites no evidence to suggest otherwise.[30] The survey was a core element of L&I's Small Business Economic Impact Statement (SBEIS), published with the proposed rule. WECARE reviewed the survey and engaged Occulink to provide comments on it for the record. L&I responded to these comments (CES D2-9 to D2-12). WECARE could have conducted its own survey among its members if it believed the data on which L&I relied was not representative; it chose not to do so. *See ATMI v. Donovan*, 452 U.S. at 527-28.

WECARE complains that L&I regulated some risk factors not included in the survey. For some of the risk factors (*e.g.*, work with hand above the shoulder) there was an exact match with the survey questions. For others (*e.g.*, using the hand or knee as a hammer) the survey questions

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[30] WECARE''s comparison of the response rate for the exposure survey to the response rate in the Bigos study is wrong. (BA 24) The survey was sent to 9872 employers. 1190 of these had gone out of business or could not be located for some other reason. Therefore, among those employers who actually received the survey and might have responded, 75% chose to do so. In the Bigos study, on the other hand, among those employees who were invited to participate and might have responded, only 40% chose to do so. L&I was correct in concluding that a 75% response rate is substantially better and provides more reliable information than a 40% response rate. See (CBA 9-10; AR 118036-118037).

and the risk factor definitions were so substantially similar that L&I considered them an appropriate basis for decision making.[31] For three risk factors (kneeling, squatting and working with the neck bent) L&I did not use information from the survey but relied on other information, so the divergence between the survey questions and the risk factor definitions had no impact.[32] L&I acted reasonably in extrapolating from the survey data available to it. *ATMI v. Donovan*, 452 U.S. at 527-528; *United Steelworkers of America v. Marshall*, 647 F.2d at 1266.

WECARE argues that L&I "relied almost exclusively" on an OSHA Preliminary Economic Analysis (PEA) to calculate the costs of implementation controls. They find fault with this because the federal

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[31] WECARE's critique of the exposure survey is also based on several factual inaccuracies. For example, WECARE incorrectly claims (BA 23 n. 5) that the rule's lifting table in Appendix B "forbids" all lifts of thirty pounds even if performed once a day. Such lifts are not within the caution zone and do not require further analysis. Similarly, exposure to vibration "for only a few minutes" is not within the caution zone and therefore, cannot, as alleged by WECARE, be a hazard requiring control. Also, it is not true that the survey assumed that no control measures would be required for any exposures of less than 4 hours (BA 23-24). The survey gathered information on all levels of exposure, including those less than four hours. (AR 118104).

[32] For these three risk factors, L&I relied upon occupational data from the Washington Employment Security Department, OSHA's 1993 employer survey and the *U.S. Department of Labor Dictionary of Occupational Titles*. (AR 110391-110513). These sources provided information on percent employment by occupation within industries, major processes within industries, and the physical demands of specific occupations. Five professional ergonomists reviewed each industry group by occupation and process to determine where employment was likely to expose employees to risk factors at the caution zone and hazard levels.

proposal differed substantially from L&I's rule, and because OSHA's analysis, they claim, was flawed. WECARE's criticism fails. First, L&I relied only on OSHA's unit cost data, and incorporated this data into its own analysis of the rule. Second, although OSHA's proposal differed from L&I's rule, the differences did not materially affect the relevance of the unit cost estimates for L&I's analysis. OSHA's unit cost estimates reflected a proposal requiring employers to "eliminate or reduce" ergonomic hazards. Although employers might proceed incrementally under OSHA's proposal, they would have to continue to reduce exposures in an almost unending fashion, as long as injuries continue to occur. L&I, on the other hand, set specific hazard job criteria and provided employers with more certainty than OSHA about when they were finished paying for controls. (CES 74; AR 117704). If anything, L&I's rule requires less control, and lower costs, than did the OSHA proposal.

L&I's conclusion that OSHA's unit control costs were a reasonable basis for estimating the control costs of its rule is similar to OSHA's conclusion that cost estimates developed to analyze a proposed 100 ug/m3 lead standard could be reasonably used to predict the costs to comply with a final 50 ug/m3 lead standard. *See United Steelworkers v. Marshall*, 647 F.2d at 1277; *ATMI v. Donovan* , 452 U.S. at 527-28. In permitting OSHA to rely on cost estimates for one proposal as the basis for determining the cost of compliance for a different rule, the D.C. Circuit reiterated its view of the best available evidence standard and refused to set "an unprecedented evidentiary burden on the agency to

show not only that its evidence was substantial but also that it was the best." *United Steelworkers* 647 F.2d at 1277, n. 133. Since L&I was not required to "reinvent the wheel" and create its own comprehensive cost estimates, *see Aviation West*, OSHA's numbers were still the "best available evidence."

WECARE also criticizes L&I for relying on OSHA's unit cost estimates because the ergonomists who developed them were not given specific guidance on the "type of controls" expected of employers. (BA 26). They were, however, given guidance about the "job interventions defined by OSHA." (BA 26) WECARE does not describe what effect this subtle difference may have had on the cost estimates. L&I was justified in using cost estimates prepared by experts given such guidance. L&I is clearly permitted "to rely on expert judgements" and make reasonable predictions based on 'credible sources of information' whether data from existing plants or expert testimony. *AISI v. OSHA*, 939 F.2d 975 (D.C. Cir. 1991). The unit cost estimates in OSHA's comprehensive economic analysis contained the best evidence available to L&I. L&I was not required to create better data. *Aviation West* 138 Wn.2d at 427-429, *United Steelworkers*, 647 F.2d at 1266-67.

L&I also estimated the quantifiable annual social benefits of ergonomic regulation at $778.8 million. (CBA 51; AR 118078). L&I listed substantial added benefits from ergonomic regulation that it could not quantify. (CBA 52-59; AR 118079). L&I estimated benefits by identifying the number of WMSDs that would likely occur absent

regulation, the likely effect of the rule, and the direct and indirect costs of those WMSDs.

WECARE calculates a different number of WMSD cases and infers some error in L&I's estimate of benefits. Of course, WECARE's difference of opinion is not a basis for invalidating L&I's conclusions. *Aviation West* at 429. In addition, WECARE, not L&I, incorrectly counts the number of WMSD cases. WECARE omits an adjustment for the estimated 15,400 claims for medical benefits among self-insured employers. (CES 3; AR 117662; CBA 35; AR 118062). The total 68,146 WMSDs estimated by L&I equals the sum of 23,465 lost time claims between 1995-1997, 29,281 medical-only claims for state fund employers, and 15,400 medical-only claims estimated for self-insured employers. (CBA 35; AR 118062; AR 114214-114313)[33]

WECARE also claims L&I exaggerated the number of WMSDs by including claims with codes of "rubbed or abraded," "bodily reaction" and "objects being handled." WECARE is wrong for several reasons. Only 0.04% of the WMSD claims were coded as "rubbed or abraded. Even if

[33] WECARE makes two other errors. First, they claim that L&I could only have come up with the sum of 68,146 WMSDs by including such sudden onset claims as amputations, contusions and fractures. This is unsupported by any evidence. WECARE merely refers to a table describing the workers' compensation coding system, mistakenly assuming that because there are codes for amputations, contusions and fractures, L&I must have relied on such cases during the rulemaking. Second, WECARE's comparison with OSHA's estimates is flawed. OSHA relied on data from the Bureau of Labor Statistics (BLS). L&I relied on worker's compensation data. The two data sets cannot be directly compared.

all these claims were incorrectly counted, the error was harmless. Second, because misclassification is always a possibility in studies involving injury records, L&I conducted "numerous medical records abstraction exercises" to ensure accuracy. (AR 114227) L&I examined individual case files with these codes to evaluate possible misclassification. In the vast majority of cases the claims were clearly associated with the hazards regulated by the rule.[34] Finally, WECARE's critique of the workers' compensation data ignores the fact that such data is widely recognized as understating occupational illness and injury. (CES 32).

Having determined that more than 68,000 WMSDs will occur each year in Washington without a rule (CBA 35; AR 118062), L&I then estimated that its rule would reduce WMSDs by 40%, and their associated costs by 50% (CBA 50; AR 118077). It estimated the effectiveness of the rule using two separate analyses: one of epidemiological literature and another of published reports of interventions. L&I carefully explained its use of each. (CES 73-105; AR 117703-117735 and CBA 46-50; AR 118073-11).

WECARE faults L&I's analysis for several reasons.[35] First, they claim that none of the epidemiological studies cited by L&I control for

[34] For example, a shoulder strain case that had a bodily reaction code was associated with "reaching overhead." Or, a case of carpal tunnel syndrome that had a code of "rubbed or abraded" was associated with "repetitively using a grinder." No cuts or scrapes were counted as WMDs. *See, generally*, AR 114226-114229, and 114260.

[35] At BA 36, WECARE attempts to use the handwritten notes of an L&I employee that were not part of the rule-making file to argue that the

non-work variables. (BA 34). In fact, L&I "gave the most serious consideration to studies meeting the NIOSH epidemiological review criteria," which included proper consideration of confounding variables, such as non-work factors. (CES 73; AR 117703) Second, WECARE repeats their earlier argument that epidemiology studies should not be used to evaluate workplace ergonomic programs because the FDA uses RCTs in evaluating drug efficacy. As we explained above, there is no reason to disregard compelling studies in favor of potentially more compelling but non-existent ones.

Third, WECARE claims L&I inappropriately considered "risk ratios" and "relative risk" in its evaluation of epidemiology studies. (BA 33-34) They argue that very large relative risks can be meaningless if the baseline risk in a population is trivially small. While true, it is irrelevant where more than 52,000 WMSDs occur every year, and where there is a very high baseline rate of musculoskeletal disorders in the general population. Even risk ratios much smaller than those identified by L&I in the epidemiological literature would have significant meaning for this rulemaking**.** Finally, WECARE faults L&I's review of published reports of successful ergonomic programs, claiming they are biased and "unreliable." (BA 31) They suggest that ergonomics interventions often fail but go unreported, and that, therefore, L&I should discount the

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agency proceeded "in total ignorance" in determining the benefits of the rule. It is unclear in what context these notes were written, or what relevance they have to this proceeding. WECARE's "analysis" of the meaning of these notes is pure speculation.

reported successes. L&I was not required to invent failed ergonomic efforts as part of its rulemaking. It was permitted to rely on the best evidence available to it.[36]

WECARE faults L&I for not relying on what they view as better evidence of the effectiveness of health interventions. But WECARE cites no such better evidence. Only one court has addressed the question of whether outcome studies are a prerequisite to occupational health regulation, rejecting "the notion that the Secretary must have studies…. that may not exist before he may set [a standard] *" Asarco, Inc. v. OSHA*, 746 F.2d at 492. This Court should follow the Ninth Circuit's lead and reject petitioners' criticism of L&I's estimate of the effectiveness of the ergonomics rule.

What is more, individual success stories are an important way to show what a rule will accomplish. Federal courts have repeatedly relied upon reports of an employer's ability to comply with a rule as evidence that the rule's mandate can be met. *United Steelworkers v. Marshall*, 647 F.2d at 1266. Otherwise rulemaking would measure what industry has

[36] WECARE criticizes the published reports of successful ergonomic interventions because they were not written by "scientific personnel" (BA 31); their criticism is unclear since they do not explain why a professor of industrial engineering is not qualified to observe the effectiveness of engineering changes in the workplace. WECARE also criticizes several specific success stories. Their criticisms have no impact on the outcome of L&I's analysis. For example, the NIOSH report they criticize shows an increase in WMSDs in the short term, but a long-term decline in WMSDs. Many of WECARE's criticisms are simply irrelevant. To cite one example, at BA 33, they criticize a study by Melhorn. Yet, L&I did not use any numbers from the Melhorn study in its calculations.

already done, not what an employer can do. Thus, reports of some employer's success in reducing workplace ergonomic hazards provide a clear indication of what other employers can accomplish as well. L&I was justified in relying on successful ergonomic interventions to predict the effect of its rule.

WECARE repeatedly criticizes the CBA, claiming better evidence could produce a more rigorous analysis. But the evidence they prefer does not exist, and even if it did, there is no reason to believe it would change the ratio of benefits to costs. If new evidence becomes available showing L&I's analysis is flawed, WECARE can petition to amend the rule and L&I will be required to respond to its claim. RCW 34.05.330. But nothing in the APA permits this Court to invalidate this rule based on speculation about what hypothetical future evidence might demonstrate.

2. The Determination that Benefits Exceed Costs was Completed in a Timely Manner.

RCW 34.05.328(1) requires that "before adopting a rule...an agency shall…(c) Determine that the probable benefits of the rule are greater than its probable costs.…" WECARE argues (BA 17-20) that the APA requires an agency to "publish" (or file with the code reviser) a written formal CBA at some unknown time before the final rule is signed. Significantly, they never explain <u>when</u> the APA requires this document to be filed, nor can they cite which section of the APA contains this requirement. This Court should reject WECARE's argument.

Initially, as discussed above, RCW 34.05.328 does not require that an agency prepare a formal written document entitled "Cost Benefit Analysis," much less publish or file it. The statute only requires a "determination." This is equally true of the other six "determinations" to be made by agencies pursuant to RCW 34.05.328(1). The only requirement regarding these "determinations" is that they be adequately "justified" in the rule-making file. RCW 34.05.328(2). The only separate written document required by RCW 34.05.328 is the "rule implementation plan" required in a separate section, RCW 34.05.328(3). Further, nothing in the statute indicates that the agency's "determination" is to be "filed" during the comment period as argued by WECARE.[37] Additionally, the extensive legislative history never mentions this issue.

WECARE has never explained exactly <u>when</u> the APA requires a CBA to be filed. If it is filed before the public hearings, the CBA could not reflect changes to the rule after the hearing, would therefore not be accurate, and would subject the agency to a challenge that it had already

[37] The only authority cited regarding this alleged requirement is a ruling by the Shoreline Hearings Board invalidating rules enacted by the Department of Ecology. That ruling is currently on appeal to Thurston County Superior Court under Cause Numbers 01-2-01790-7, 01-2-01792-3, 01-2-01793-1, 01-2-01797-4. The only other authority cited are puzzling references to *Hillis v. Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997). (BA 18-20). *Hillis* is distinguishable in that it found an APA violation where the agency had relied on a policy instead of adopting rules. Since there was no rule-making, *Hillis* never discusses the procedural rule-making requirements of the APA.

made up its mind before the hearings.[38] The requirement that the *determination* be completed "before adopting a rule" simply requires that the agency must complete its analysis before enacting a rule to ensure the analysis is considered by the decision-maker.

When the Legislature wants a document filed with the code reviser before a rule is adopted, it clearly so states. RCW 34.05.320(k) and RCW 19.85.030(1) both specifically require agencies to file the Small Business Economic Impact Statement (SBEIS) with the code reviser at the time a proposed rule is filed. RCW 34.05.320's detailed list of documents required to be filed before a rulemaking hearing does not mention a CBA. Indeed, it requires the agency to determine only whether the rule is a significant legislative rule subject to RCW 34.05.328.[39]

WECARE's argument appears to be based on the theory that they lacked notice of L&I's reasoning process. Although not required, L&I made public at the start of the comment period a detailed analysis of the

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[38] For the past two legislative sessions, the Association of Washington Business has sought an amendment to the APA requiring that a CBA be filed at the time the rule is proposed. *See*, Appendix , HB 2716**.** The Legislature has never passed such an amendment.

[39] Generally accepted rules of statutory construction require this court to presume that by amending RCW 34.05.320 to require only that a determiniation of whether a rule is significant be made when a proposed rule is filed, the Legislature did not intend to require the filing of a detailed analysis of costs and benefits at that time. Additionally, presumably, if the "determinations" regarding benefits and costs must be filed at the time of the rule is proposed, the other "determinations" required by RCW 34.05.328 must also be filed at this time. It is curious that WECARE appears to argue that this "determination" was somehow treated differently by the Legislature.

costs of compliance with its proposed rule, its scientific basis for concluding that WMSDs were a substantial unregulated hazard, and its approach to evaluating whether the rule would reduce WMSDs. The studies on which L&I relied were available to the public for inspection and copying. As more recent data became available, L&I made that public as well.

WECARE members submitted reams of comments on these issues. WECARE submitted a cost study to the record. By fairly apprising WECARE members of the data on which it intended to rely, *United Steelworkers v. Marshall,* 647 F.2d at 1221, L&I ensured that members of the public had an opportunity to participate meaningfully in the development of the rule, including the analysis of costs and benefits. Nothing more was required.[40]

WECARE now argues that L&I ultimately relied upon later versions of its annual statistical report on WMSD claims and OSHA's PEA than were available during the rulemaking hearings. However, it would be unreasonable to expect that the agency would not use the most recent versions that became available before the rule was adopted,

[40] WECARE's claim at BA 59 that it lacked any notice that L&I would base any of its economic analysis on OSHA's prior analysis is false. On January 7, 2000, WECARE's prior attorney reviewed this data as well as thousands of other documents provided pursuant to a broad Public Disclosure Act request submitted by WECARE at the beginning of the public comment period (AR 106362-106398).

particularly since these did not affect the analytic approach that L&I had described earlier.

E. WECARE's Other Arguments Should be Rejected.

1. L&I Coordinated the Rule with Other Laws.

RCW 34.05.328 (1)(h) requires that L&I: "Coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter." However, unlike the other requirements of RCW 34.05.328(1), section (h) was excluded from RCW 34.05.328(2)'s requirement that the agency document it's analysis in the rule-making file. Thus, L&I exceeded the APA's requirement by documenting this finding. (CES E15-E16; AR 118000-118001). Therefore, WECARE's criticism at BA 52-53 of L&I's documentation of compliance with this section must fail.

L&I correctly concluded that it had no obligation to coordinate the ergonomics rule with either a *proposed* federal ergonomics rule, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, state disability law, RCW 49.60, or with worker compensation law (RCW 51). WECARE's argument to the contrary (BA 52-53) should be rejected.

There is no federal ergonomics rule. When L&I issued its rule, OSHA had proposed an ergonomics standard. L&I, however, was not required to coordinate its ergonomics rule with a federal proposal that had not been finalized. Nor has WECARE suggested what the agency should have done differently.

L&I also had no obligation to coordinate its rule with the ADA or state disability law. The ergonomics rule regulates worker exposure to risk factors. The ADA does not. It regulates discrimination against disabled employees. Thus, WECARE is wrong to suggest (BA 53) that the ergonomics rule and the ADA are applicable to "the same activity or subject matter."

Furthermore, any overlap between the ergonomics rule and the ADA is more imagined than real. Few workers with WMSDs actually gain ADA protection. *See Toyota Mfrg. Ky. v. Williams*, 534 U.S. 184, 122 S. Ct. 861, 151 L. Ed. 2d 615 (2002). Workers ordinarily are not disabled under the ADA if they suffer from non-chronic or temporary conditions, back injuries, or carpal tunnel syndrome. *See generally,* Rabinowitz, Occupational Safety & Health Law *at 882-886* .

Nor does the rule conflict with RCW 51 (Industrial Insurance) (BA 53). The goal of the WISHA and of this rule is to prevent injuries and illnesses. Nothing in this rule conflicts with the goal of worker's compensation to provide medical benefits and income replacement to those injured at work. (CES 59; AR 117698). *See United Steelworker,* 647 F.2d at 1234-35 (noting that all health standards, in some way, affect workers' compensation because they reduce the number of workers who get sick).

2. The Rule Does not Violate Due Process of Law.

WECARE seems to argue (BA 54-56) that the rule violates due process because employers are given the choice of meeting either the specific requirements of Appendix B or the alternative "general performance approach." WAC 296-62-05130. WECARE misses the point of this innovative feature of the rule. WECARE does not content that Appendix B is vague, and no employer is required to comply with the general performance approach unless it chooses to do so. It is difficult to understand how an added voluntary option can violate due process.

In *Inland Foundry, Co. v. Labor & Indus.*, 106 Wn. App. 333, 339-340, 24 P.3d 424 (2001), the Court rejected a similar due process claim against WISHA rules, holding the party bringing a vagueness challenge "bears the heavy burden of proving the regulation's unconstitutionality beyond a reasonable doubt." Here, WECARE fails to cite any cases where a court has allowed a vagueness challenge before the agency even starts to enforce the rule.

3. The Superior Court Correctly Declined to Admit Post-Rule Enactment Documents.

At BA 56-61, WECARE asks this court to admit documents that were not in existence at the time the rules were signed in May of 2000. In the three cases addressing this issue in an APA rule-making challenge, this Court has consistently stated such materials are inadmissible. *See, Neah Bay, Rios, Aviation West.* RCW 34.05.562 (1) provides:

New evidence taken by court or agency.

> (1) The court may receive evidence in addition to that contained in the agency record for judicial review, *only if it relates to the validity of the agency action at the time it was taken.*...
>
> (emphasis added)

Here, WECARE is seeking to admit testimony by witnesses in OSHA's ergonomics rule-making hearings held after these rules were enacted as well as post-rule enactment documents relating to the RCW 34.05.328 rule implementation plan. It is argued that, because L&I partially relied on OSHA's PEA, post-rule enactment evidence about the federal PEA is admissible. This Court rejected a similar argument in *Aviation West.* There, L&I relied on the EPA report. 138 Wn.2d at 426. The tobacco companies asked this Court to consider a federal court ruling issued after the rule was enacted that criticized the EPA report. In refusing to do so, this Court held:

> However, even if the District Court is correct, and the EPA report is flawed, the Department rule-making built atop it four years earlier would not, as appellants apparently suggest, collapse like a house of cards. *Regulations are not that tenuous*. The standard under our state's APA is whether the choice to rely upon the EPA report was rational at the time it was made.
>
> 138 Wn.2d at 427. (emphasis added)

Aviation West also noted at 138 Wn.2d at 440 that the Court is "not free to make forays outside of the administrative record in order to cite authorities to support our decision."[41]

Similarly, in *Neah Bay,* 119 Wn.2d at 475, this Court held:

> The trial court relied solely on deposition and other testimony of experts which was not contemporaneous with the rule-making process. Such evidence is rarely relevant, and should supplement, not replace, the administrative record.

In further criticizing the trial court's use of evidence outside of the rule-making file, this Court stated:

> Moreover, although under some limited circumstances a court may take new evidence, the validity of agency action is to be determined *as of the time it was taken*. RCW 34.05.562(1); RCW 34.05.570(1)(b).
>
> 119 Wn.2d at 475-475 (emphasis added)[42]

Third, in the most recent ruling on this issue, in *Rios,* this Court partially reversed the Court of Appeals, and upheld a 1993 rule where the Court of Appeals had partially relied upon post 1993 evidence (a 1995 study) in finding the 1993 rule to be invalid. In contrast, this Court carefully divided its decision into two sections. In the section discussing

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[41] In footnote 14, the majority in *Aviation West* criticizes the dissent for relying on a 1992 law review article that was not part of the rule-making file. 138 Wn.2d at 439. Since the rule at issue was enacted in 1994, the article was in existence at the time of the rule-making. A similar analysis would apply to the exhibits proposed here by WECARE that existed in May 2000, but were not part of the rule-making file.

the validity of the 1993 rule, the Court only reviewed evidence relating to L&I's decision-making process at the time the rule was enacted.

This Court has consistently refused to consider evidence that was not "contemporaneous" with the rule-making. WECARE does not address these rulings, nor does it cite a case where this type of evidence has been admitted in a rule-making challenge.

L&I is not suggesting that WECARE is without remedy if they truly believe these post rule-enactment documents reveal flaws in the rule. As demonstrated in *Rios*, WECARE may submit these documents to L&I and ask that the rule be amended or repealed based on this new information (*see* RCW 34.05.330 - Petitions for adoption, amendment and repeal of rules).

VI. CONCLUSION

WECARE has failed to meet its burden under the APA to prove that the ergonomics rule is invalid. The decision of the Superior Court dismissing their Petition for Review should be affirmed.

RESPECTFULLY SUBMITTED this _____ day of February, 2003.

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